No. 17,317

United States Court of Appeals

For the Ninth Circuit

LAVERE REDFIELD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLANT'S OPENING BRIEF

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Subject Index

Table of Authorities Cited

Cases

Codes

Constitutions

Rules

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STATEMENT AS TO JURISDICTION

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal pursuant to 28 *United States Code,* Sec. 1291, which provides:

"Sec. 1291. *Final decisions of district courts.*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

The appellant on October 28, 1960, was convicted by a jury on six counts of an eight-count indictment charging him with income tax evasion under Section 145 (b), Internal Revenue Code of 1939; 26 United States Code, 1939 Edition, Section 145 (b), and Section 145 (b), and Section 7201, Internal Revenue Code of 1954; 26 United States Code, 1954 Edition, Section 7201 (Rec. p. 2). A motion for new trial was timely filed by appellant on November 3, 1960 (Rec. p. 30), argued on March 3, 1961 (Rec. p. 122), and denied on March 23, 1961 (Rec. p. 123). A notice of appeal from the judgment of conviction and order denying the motion for new trial was timely filed on March 27, 1961 (Rec. p. 180). A statement of points and designation of record was filed by appellant in this Court on April 28, 1961. The record on appeal was filed in this Court on April 26, 1961.

This Court has jurisdiction of this appeal pursuant to 28 *United States Code,* Sec. 1291 and Rule 37 of the *Federal Rules of Criminal Procedure.*

STATEMENT OF THE CASE

On May 26, 1960, the appellant was indicted by a Federal Grand Jury on an eight-count indictment charging him with income tax evasion under Section 145 (b), Internal Revenue Code of 1939; 26 United States Code, 1939 Edition, Section 145 (b), and Section 7201, Internal Revenue Code of 1954; 26 United States Code, 1954 Edition, Section 7201 (Rec. p. 2). The appellant was arraigned before the Honorable

John R. Ross on June 16, 1960 (Tr. Vol. I, p. 3). At the arraignment, the appellant, appearing without counsel, entered a plea of not guilty to each of the separate counts of the indictment (Tr. Vol. I, p. 10). Following the arraignment, the matter was placed upon the jury trial calendar for trial at a date as early as possible and bail was continued in the sum of ten thousand dollars (Tr. Vol. I, p. 10). On October 4, 1960, trial by jury commenced in the United States District Court for the District of Nevada at Carson City, Nevada. Throughout the course of the trial, appellant appeared without counsel. On October 28, 1960, a petit jury returned a verdict of guilty as charged on counts I, II, III, V, VI and VII and not guilty on counts IV and VIII (Rec. p. 28). Following the return of the verdict, the Court adjudged the appellant guilty in conformity with the verdict (Tr. Vol. VIII, pp. 2109, 2110). The Trial Court then continued the case until the 10th day of November, 1960 at the hour of 1:30 o'clock p.m. at Las Vegas, Nevada, for the purpose of imposition of sentence (Tr. Vol. VIII, p. 2110). The Trial Court then revoked the appellant's bail and remanded him to the custody of the United States Marshal (Tr. Vol. VIII, p. 2110).

On November 2, 1960, appellant retained the firm of Grubic, Drendel & Bradley, Reno, Nevada, to represent him in this matter. On November 3, 1960, appellant, through his counsel, filed a motion for new trial (Rec. p. 30). The motion for new trial was set for hearing on November 10, 1960. On November 10,

1960, the appellant was sentenced to pay a fine of ten thousand dollars on each of six counts, or a total fine of sixty thousand dollars, together with costs of prosecution and to serve a term of five years on each of six counts, said prison terms to run concurrently, and the appellant was remanded to the custody of the Attorney General, or his authorized representative (Rec. pp. 33, 34). Argument on the motion for new trial was continued until counsel for appellant had an opportunity to review the trial transcript. The motion for new trial was argued on March 3, 1961. On March 23, 1961, the Court entered its written order denying appellant's motion for new trial (Rec. p. 123). On March 27, 1961, a notice of appeal was filed (Rec. p. 180). The record on appeal was docketed on April 26, 1961.

Throughout the pre-trial and actual trial of the case in the Court below, the appellant was not represented by counsel. Immediately following his conviction, appellant retained present counsel to represent him in this matter. A motion for new trial was urged in the Trial Court which raised the following points:

1. Appellant was not capable of competently and intelligently waiving his constitutional right to assistance of counsel, and, therefore, there was no waiver by appellant of his right to be represented by counsel.

2. Assuming for the sake of argument but without conceding that there was a proper waiver of his right to counsel by appellant, the appellant was nevertheless denied his constitutional right to a fair and impartial trial because appellant, acting as his own counsel, was

not capable of conducting his own defense, and the record in the trial in this case establishes that the appellant was so ignorant of law and procedure and his defense was so inadequate and incompetent that he has been deprived of his liberty in violation of his rights under the *Sixth Amendment to the Constitution of the United States.*

3. Appellant was denied an impartial trial by virtue of the prejudicial nature of the Trial Court's treatment of appellant in the presence of the jury throughout the course of his trial.

4. The attorney for appellee during his closing argument appealed to the passion and prejudice of the jury concerning irrelevant matters, thereby intending to inflame the jury against the appellant.

QUESTION INVOLVED

Did the appellant in the Court below receive that fair and impartial trial to which every accused is entitled under the Constitution and Laws of the United States of America?

SPECIFICATIONS OF ERROR

1. It was error for the Trial Court to proceed with the trial in this cause without first determining whether or not the appellant was capable of competently and intelligently waiving his constitutional right to the assistance of counsel.

2. It was error for the Trial Court not to intervene when it became apparent to the Court during the course of the trial that the appellant was so ignorant of law and procedure and his defense was so inadequate and incompetent as to reduce the trial to a sham and a farce.

3. It was error for the Trial Court to harass and belittle appellant in the conduct of his defense in the presence of the jury throughout the course of the trial. The prejudicial nature of the Trial Court's treatment of appellant in the presence of the jury throughout the course of the trial resulted in a denial to appellant of a fair and impartial trial.

4. It was error for the Trial Court to permit the attorney for the appellee during his closing argument to appeal to the passion and prejudice of the jury concerning irrelevant matters, thereby intending to inflame the jury against the appellant.

SUMMARY OF ARGUMENT

The Appellant in the Court Below Did Not Receive That Fair and Impartial Trial to Which Every Accused Is Entitled Under the Constitution and Laws of the United States of America for the Following Reasons:

I

Appellant, a layman with a high school education though eminently successful in acquiring wealth, was incapable of competently and intelligently waiving his

right to the assistance of counsel. His decision to proceed without counsel was in fact the opposite of an intelligent and competent decision but was rather an emotional and irrational decision. The Court below failed to determine on the record whether there was an intelligent and competent waiver by the appellant of his right to counsel prior to trial as required by law.

II

Appellant acting as his own counsel throughout the pre-trial and trial of this case in the Court below was not capable of conducting his defense and the record of the trial establishes that appellant was so ignorant of law and procedure and his defense was so inadequate and incompetent that he has been deprived of his liberty in violation of his rights under the *Sixth Amendment to the Constitution of the United States.* The Trial Court failed in its duty to appellant appearing without counsel to see that the essential rights of appellant were preserved by appropriate intervention when it became apparent during the trial that appellant was incapable of conducting his defense.

III

Appellant throughout the course of the trial in the presence of the jury was constantly harassed and belittled by the Trial Judge. The Trial Judge commenced interrupting and belittling appellant in the first sentence of appellant's opening statement to the jury and continued this conduct through the final sentence of appellant's closing argument. The preju-

dicial nature of the Trial Court's treatment of appellant in the presence of the jury throughout the course of the trial precluded appellant from receiving a fair and impartial trial.

IV

The attorney for appellee during his closing argument appealed to the passion and prejudice of the jury concerning irrelevant matters, thereby intending to inflame the jury against the appellant.

ARGUMENT

I

APPELLANT WAS NOT CAPABLE OF COMPETENTLY AND INTELLIGENTLY WAIVING HIS CONSTITUTIONAL RIGHT TO ASSISTANCE OF COUNSEL, AND, THEREFORE, THERE WAS NO WAIVER BY APPELLANT OF HIS RIGHT TO BE REPRESENTED BY COUNSEL.

See Affidavit of Raymond Milton Brown, M.D. (Rec. p. 62).

See Affidavit of Rudolph B. Toller, M.D. (Rec. p. 68).

The decision of the Supreme Court of the United States, decided May 23, 1938, *Johnson v. Zerbst,* 304 U. S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019, 146 A. L. R. 357, is the landmark case followed exhaustively by the Courts of the United States concerning the waiver by an accused of his constitutional right to be represented by counsel assured an accused by the *Sixth Amendment to the Constitution of the United States.*

In this case, petitioner and another man, both enlisted in the Marine Corps, were arrested in South Carolina on November 21, 1934, charged with feloniously uttering, possessing and passing counterfeit money. They were bound over to await action of the United States Grand Jury but were kept in jail due to inability to give bail. On January 21, 1935, they were indicted. On January 23, 1935, they were taken to Court and there first given notice of the indictment, immediately were arraigned, tried, convicted and sentenced that same day to four and one-half years in the penitentiary. On January 25, they were transferred to the federal penitentiary in Atlanta, Georgia. Counsel had represented them in the preliminary hearing two months prior to trial in which they were bound over to the Grand Jury. The accused were unable to employ counsel for their trial. At arraignment, both pleaded not guilty and said they had no lawyer, and, in response to an inquiry of the Court, stated that they were ready for trial. They were then tried, convicted, and sentenced without assistance of counsel. This case was before the Supreme Court of the United States on a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit to review a judgment affirming a judgment of the District Court of the United States for the Northern District of Georgia dismissing a petition for a writ of habeas corpus. The Supreme Court of the United States reversed. In reversing the decisions of the lower Courts, the Supreme Court said:

> "The Sixth Amendment guarantees that 'In all criminal prosecutions, the accused shall enjoy

the right . . . to have the assistance of counsel for his defense.' This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. Omitted from the Constitution as originally adopted, provisions of this and other Amendments were submitted by the first Congress convened under that Constitution as essential barriers against arbitrary or unjust deprivation of human rights. The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned Counsel. That which is simple, orderly and necessary to the lawyer—to the untrained layman—may appear intricate, complex and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to '. . . the humane policy of the modern criminal law . . .' which now provides that a defendant '. . . if he be poor, . . . may have Counsel furnished him by the state . . . not infrequently . . . more able than the attorney for the state.'

"The '. . . right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He

is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.' The Sixth Amendment withholds from Federal Courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of Counsel.

"There is insistence here that petitioner waived this constitutional right. The District Court did not so find. It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to Counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

. . .

"The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused

may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

. . .

"Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of Counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a Federal Court's authority to deprive an accused of life or liberty. When this right is properly waived, the assistance of Counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by Counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A Court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment required—by providing Counsel for an accused who is unable to obtain Counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.

. . .

"The cause is reversed and remanded to the District Court for action in harmony with this opinion."

Johnson v. Zerbst, supra, was followed in the case of *Adams v. United States,* 317 U. S. 269, 63 S. Ct. 236, 87 L. Ed. 268, 143 A. L. R. 435. In that decision, the Supreme Court said:

> "The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the Court, may waive trial by jury, and so likewise may he competently and intelligently waive his constitutional right to assistance of Counsel."

Other cases following the rule set forth in *Johnson v. Zerbst,* supra, are:

Humphries v. United States, 68 A. 2d 803;
Zahn v. Hudspeth, 102 F. 2d 759;
Hall v. Johnston, 103 F. 2d 901;
Sanders v. United States, 205 F. 2d 399.

The Court as has been pointed out in the case of *Johnson v. Zerbst,* supra, stated:

> "While an accused may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

The Court also said in the same case:

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to Counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

The record in the case at bar does not establish that the Trial Court made any determination as to whether or not the appellant competently and intelligently waived his right to counsel (Tr. Vol. I, p. 14, lines 13-20; Vol. V, p. 1270, lines 1-4). At this point in the record, the Trial Court demonstrates that it recognized its duty to determine whether or not an accused is capable of defending himself and asked the appellant whether or not he proposed to take the position that he was not competent to defend himself. The appellant answered that he felt he was competent to defend himself. However, the Trial Court made no determination on this vitally important point and as the record amply demonstrates, the appellant was not competent to defend himself. It is respectfully submitted that appellant did not competently and intelligently waive his right to counsel and the trial in the Court below was therefore a nullity.

II

APPELLANT ACTING AS HIS OWN COUNSEL THROUGHOUT THE PRE-TRIAL AND TRIAL OF THIS CASE IN THE COURT BELOW WAS NOT CAPABLE OF CONDUCTING HIS DEFENSE AND THE RECORD OF THE PROCEEDINGS IN THE COURT BELOW ESTABLISHES THAT APPELLANT WAS SO IGNORANT OF LAW AND PROCEDURE AND HIS DEFENSE WAS SO INADEQUATE AND INCOMPETENT THAT HE HAS BEEN DEPRIVED OF HIS LIBERTY IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Trial Court failed in its duty to appellant appearing without counsel to see that the essential rights

of appellant were preserved by appropriate intervention when it became apparent during the trial that appellant was incapable of conducting his defense.

The *Sixth Amendment to the Constitution of the United States* provides:

> "*Rights of accused in criminal prosecutions.* In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

The entire record of the trial of this matter in the Court below establishes that the appellant did not have the slightest conception of how to protect his rights in a criminal proceeding. Appellant did not register twenty objections during the entire four-week trial. Appellant had no idea how to conduct a cross-examination of an adverse witness. Appellant informed the Trial Court of this while conducting his cross-examination of Harold S. Chisholm (appellee's witness) (Tr. Vol. III, p. 798). The Trial Court at that point, in the presence of the jury, stated (Tr. Vol. III, p. 799, lines 4-10):

> "The Court. I don't propose to have you impose on the jury by standing there hour after hour indicating how stupid you are or at what a loss you are at defending your own case. You

had the right to have counsel. Now, you chose not to have. Having chosen to represent yourself, you must assume the difficulties and the hazards, but don't weep. It was a voluntary choice on your part."

During the appellant's attempted cross-examination of Mr. Martin Hoffenblum (appellee's witness), the Court stated in the presence of the jury (Tr. Vol. V, p. 1384, lines 5-10):

"Mr. Redfield. I am simply trying to bring out the complete and true facts.

The Court. You do it according to the rules of procedure and evidence. Just because you want to be your own attorney, that doesn't mean that the bars of procedure are down and you can conduct this like you would a Piute powwow."

The instructions that appellant offered in the Court below were wholly inadequate and the appellant did not object to instructions offered by the appellee. Appellant offered to stipulate any evidence into the record that the appellee wished to put in and made no attempt to object to any documentary evidence other than a couple of feeble objections concerning material on years outside of the years covered by the indictment. Even after having made these objections, appellant stipulated the objectionable material in evidence. The total trial record indicates that appellant did not register any objections to the introduction of proof on the part of the appellee. The appellant offered to stipulate

"anything in the way of evidence that they have for the years under which I am indicted, and I

have no objection to the introduction of anything whatever." (Tr. Vol. II, p. 313, lines 4-7.)

This offer to stipulate was rejected but the record indicates that appellant carried out the tenor of the stipulation by failing to object to anything the appellee offered encompassed within the years included in his indictment.

Lunce v. Overlade, C. A. 7 (1957), 244 F. 2d 108; 74 A. L. R. 2d 1384.

In this case Lunce petitioned the United States District Court for the District of Indiana for a writ of habeas corpus alleging that petitioners had been illegally convicted of robbery in a State Court. Petitioners were defended in the Indiana Court by an Ohio lawyer who was so ignorant of Indiana law and procedure as to render it virtually impossible for him to protect the petitioners' right. The District Court dismissed the petition for a writ of habeas corpus and petitioners appealed. The Circuit Court of Appeals for the Seventh Circuit reversed and held that if the petitioners established by adequate and competent proof the pertinent allegations contained in their petitions, they would show that their conviction was so lacking in fundamental fairness as to be in violation of their rights under the *Fourteenth Amendment to the United States Constitution.* In reversing, the Circuit Court through Judge Swaim said:

". . . However, where the representation of an accused by his counsel is so lacking in diligence and competence that the accused is without representation and the trial is reduced to a sham,

it is the duty of the state to see that the essential rights of the accused are preserved by appropriate intervention. United States ex rel. Darcy v. Handy, supra; United States ex rel. Feeley v. Ragen, 7 Cir. 166 F. 2d 976. In the instant case the incompetence of the defense was so apparent as to call for intervention by the officers of the state but nothing was done. We need not consider whether the state would have been required to appoint counsel for petitioners on the facts alleged, for our concern here is the state's deprivation of petitioners' rights under the Fourteenth Amendment by denying them that fundamental fairness without which no conviction can stand.

"This court in United States ex rel. Feeley v. Ragen, supra, at 981, said:

" 'Petitions challenging the competency of counsel, especially years after the conviction, must clearly allege such a factual situation which if established by competent evidence would show the representation of counsel was such as to reduce the trial to a farce or a sham. Otherwise, they should be dismissed.' "

It is respectfully submitted that the record in the case at bar clearly establishes that the appellant, representing himself in this matter in the Trial Court, was represented by counsel so lacking in diligence and competency that he was without representation and the trial was reduced to a sham. Two observations by the Trial Court in this regard during the course of the trial in the presence of the jury, which have been quoted above, clearly establish that the trial was reduced to a sham. The Court compared appellant's

conduct of his defense to a "Piute powwow" (Tr. Vol. V, p. 1384, lines 5-10) in one instance, and in the other instance, the Court observed, also in the presence of the jury, that it would not have the appellant imposing on the jury by standing there hour after hour indicating how stupid he was, or at what a loss he was at defending his own case (Tr. Vol. III, p. 799, lines 4-10).

In a recent case decided by the United States Court of Appeals for the First Circuit February 2, 1961, *In the Matter of the United States of America,* Petitioner, 286 F. 2d 556, the First Circuit through Mr. Justice Woodbury in reversing the Trial Court for granting a judgment of acquittal made some very important observations concerning the conduct of a Trial Judge. The Court, at page 561, said:

> "It may well be that solicitude for the essential rights of an accused require the trial judge to cross-examine government witnesses when an accused with no capacity to protect his rights insists upon conducting his own defense or when an accused is represented by wholly inadequate counsel."

The First Circuit recognizes the duty of a Trial Judge to protect the basic rights of an accused who insists upon conducting his own defense. The record in the case at bar clearly establishes that the Trial Judge in the Court below rather than assisting the appellant in order to preserve his fundamental rights went to the other extreme and constantly berated and harassed the appellant by caustic remarks from the bench,

which would belittle the appellant and his defense in the eyes of the jury. The Court went on to say *In Re United States,* supra:

> "We recognize that in the federal courts the trial judge is not relegated to the position of a mere moderator. He has the duty not only to make rulings of law but also to govern the trial to assure its proper conduct. Quercia v. United States, 1933, 289 U. S. 466, 469, 53 S. Ct. 698, 289 L. Ed. 1321. *Moreover upon his shoulders rests the duty to see that the trial is conducted with solicitude for the basic and essential rights of the accused.* Glasser v. United States, 1942, 315 U. S. 60, 71, 62 S. Ct. 457, 86 L. Ed. 680. But when the trial judge assumes the role of counsel the adversary system breaks down into confusion worse confounded as the record in this case clearly shows." (Emphasis supplied.)

It is therefore respectfully submitted that the Trial Court failed in its duty to appellant appearing without counsel to see that the essential rights of appellant were preserved by appropriate intervention when it became apparent during the trial that appellant was incapable of conducting his defense.

III

APPELLANT WAS DENIED AN IMPARTIAL TRIAL BY VIRTUE OF THE PREJUDICIAL NATURE OF THE TRIAL JUDGE'S TREATMENT OF APPELLANT IN THE PRESENCE OF THE JURY THROUGHOUT THE TRIAL.

United States v. Ah Kee Eng, 241 F. 2d 157, 62 A. L. R. 2d 159.

This case involved the trial of defendant for conspiring with two other individuals to import and sell heroin. The verdict of conviction was reversed and the case remanded for further proceeding by the United States Circuit Court of Appeals for the Second Circuit. In an opinion by Judge Lumbard, the Circuit Court found, among other things, reversible error in the conduct of the Trial Judge. The Court said:

> "There is a third ground of error which also requires reversal, namely the prejudicial nature of the trial judge's treatment of defense counsel and the defense throughout the trial. Thus at numerous pages of the printed appendix the judge exhibited an attitude of impatience, and an annoyance at proper objections and interruptions as if they were captious, absurd or unnecessary. And occasionally the judge made gratuitous comments disparaging the defense counsel and the defense. See particularly pages 14, 18, 31, 37, 45, 47, 53, 67, 71, 78, 79, 89, 106, 116, 122, 124, 126, 134, 137, 140, 148, 155, 162, 192, 242, 266 and 267."

The Appellate Court in the above case, commenting on the prejudicial nature of the Trial Judge's treatment of the defendant's counsel, went on to say:

"While an appellate court should be loath to read too much into the cold black and white of a printed record, it cannot disregard numerous remarks from the bench of a nature to belittle and humiliate counsel in the eyes of the jury. Especially is this so where many of counsel's objections must be repeated in order properly to protect his client because he believes in good faith that the judge has ruled erroneously.

"While the trial judge should be permitted considerable latitude in dealing with counsel, ruling on objections, and keeping the trial moving, he must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings. Thus repeated indications of impatience and displeasure of such nature to indicate that the judge thinks little of counsel's intelligence and what he is doing are most damaging to a fair presentation of the defense. A less experienced advocate might well have trimmed his sails to such a judicial wind as prevailed in the courtroom during this trial, and thus have jeopardized the rights and the proper interests of a defendant on trial for a serious felony. Fortunately for this defendant his counsel continued to object when he thought he should and, as we have shown, events proved the wisdom and propriety of his course. Here the Court overstepped the proper bounds and, by what was said and implied before the jury, seriously prejudiced the defendant's case in the eyes of the jury.

"In view of our conclusion that there must be a reversal of the judgment for each of the three errors which we have considered, we believe it unnecessary to discuss the many other errors complained of."

In the case at bar, the conduct of the Trial Judge in his treatment of the appellant would necessarily be more impressive on the jury than in the normal case because counsel for the appellant and appellant were one and the same. As Judge Lumbard stated in the *Ah Kee Eng,* supra, case:

> "While the trial judge should be permitted considerable latitude in dealing with counsel, ruling on objections, and keeping the trial moving, he must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings."

The entire record of the trial in this matter clearly indicates that the appellant was deprived of a fair and impartial trial by virtue of the Judge's prejudicial treatment of the appellant. The Trial Judge commenced interrupting and belittling appellant in the first sentence of appellant's opening statement to the jury and continued this course of conduct through the final sentence of appellant's closing argument. It is important to note that the appellant was continuously interrupted and belittled by the Trial Judge during the entire trial of this cause, while counsel for appellee on the other hand, were accorded every courtesy and consideration by the Court. The record bears out that repeatedly during the course of the trial, appellant was chastised by the Court in the presence of the jury, and on various occasions in the presense of the jury, the Court threatened to cite appellant for contempt remarking the only reason that he hadn't done so was because the appellant was

not an attorney (Tr. Vol. III, p. 798, lines 18-25; p. 799, lines 1-10; Vol. V, p. 1380, lines 1-2). Throughout the course of the trial in this case, the Court constantly stated to appellant that if appellant were an attorney, the Court would hold him in contempt, or that if appellant were an attorney, the Court would throw him out of Court, or if appellant were an attorney, he would have been severely censored (Tr. Vol. VI, p. 1612, lines 6-18). In one instance, the Court in the presence of the jury stated to appellant that the next time he disregarded the order of the Court and made improper comments, the Court would hold the appellant guilty of contempt and give him about ten days in the federal prison in Reno. The Court at this point again stated that if the appellant were an attorney, he would have been doing time the last three weeks and admonished appellant to remember that, all in the presence of the jury (Tr. Vol. VII, p. 1690, lines 22-25; p. 1691, lines 1-19). Shortly after this incident, the Court stated to appellant:

> "The Court. Don't take that as an invitation, Mr. Redfield, because the Court will do what it promised you if you aren't careful. I have reached the end of my patience." (Tr. Vol. VII, p. 1693.) (This, of course, refers to the promise by the Court to put the appellant in prison.)

The Trial Court not only did not criticize or chastise counsel for the appellee during the course of the trial but repeatedly assumed the role of Advocate on behalf of the appellee by interrupting appellant even though no objection had been interposed by two able

and experienced Trial Counsel representing the appellee. This course of conduct on the part of the Judge continued throughout the trial. The record of the trial is replete with examples of the prejudicial conduct on the part of the Trial Judge in this regard. It is respectfully submitted that the following references to the Reporter's Transcript of the Proceedings are examples of the prejudicial conduct of the Court which appellant cites as harmful misconduct on the part of the Court calculated to prejudice appellant's standing before the jury:

Vol. I, p. 145, lines 7-23. The first two sentences of appellant's opening statement.

Vol. III, p. 792, line 25

Vol. III, p. 793, lines 1-16. It is important to note that in this instance, appellee was conducting cross-examination where it is fundamental that the examiner can ask leading questions.

Vol. III, p. 796, lines 6-20

Vol. IV, p. 873, lines 14-16

Vol. IV, p. 875, lines 10-20

Vol. IV, p. 886, lines 3-11. In this instance, Mr. Maxwell interrupted the appellant while he was asking a question. The appellant attempted to explain to Mr. Maxwell what he was attempting to do. The Court interrupted appellant and admonished him for talking while someone else was speaking, though the Court accorded Mr. Maxwell the privilege of talking while the appellant was speaking.

Vol. V, p. 893, lines 8-11

Vol. IV, p. 894, lines 16-25

Vol. IV, p. 895, lines 1-9

Vol. IV, p. 928, lines 2-5

Vol. IV, p. 929, lines 1-2

Vol. IV, p. 930, lines 4-23

Vol. IV, p. 1112, lines 6-25

Vol. V, p. 1128, lines 8-16

Vol. V, p. 1129, lines 2-10

Vol. V, p. 1211, lines 11-19

Vol. V, p. 1269, lines 20-25

Vol. V, p. 1281, lines 24-25

Vol. V, p. 1282, lines 1-5; lines 10-20

Vol. V, p. 1286, lines 2-8. In this particular instance, the Court arbitrarily cut appellant off without objection from appellee on a perfectly proper question.

Vol. V, p. 1373, lines 9-17

Vol. V, p. 1379, lines 11-25

Vol. V, p. 1380, lines 1-2

Vol. V, p. 1383, lines 5-9

Vol. V, p. 1386, lines 1-22

Vol. V, p. 1390, lines 8-22

Vol. V, p. 1391, lines 6-15

Vol. VI, p. 1424, lines 12-16

Vol. VI, p. 1559, lines 4-18. The Court here commented that the appellant may take the witness stand.

Vol. VI, p. 1560, lines 17-23

Vol. VI, p. 1562, lines 3-25

Vol. VI, p. 1563, lines 1-20

Vol. VI, p. 1564, lines 2-5, lines 15-24

Vol. VI, p. 1566, lines 18-23

Vol. VI, p. 1567, lines 1-3

Vol. VI, p. 1569, lines 1-4

Vol. VI, p. 1612, lines 3-23. In this instance, the Court chastised the appellant for improperly impeaching a witness for the appellee.

Vol. VI, p. 1614, lines 5-9. In this instance, the Court improperly underwrites the credibility of a witness for the appellee.

Vol. VII, p. 1690, lines 22-25

Vol. VII, p. 1691, lines 1-19

Vol. VII, p. 1693, lines 14-18

Vol. VII, p. 1713, lines 8-16

Vol. VII, p. 1735, lines 10-12

Vol. VII, p. 1751, lines 12-22

Vol. VIII, p. 1973, lines 18-19; pp. 1974, 1975, 1976, 1977, 1978. These references to the Reporter's Transcript of proceedings referred to the appellant's closing argument. At this point, the Court refused to permit the appellant to comment on a burglary of his home though evidence was in the record referring to said burglary (Tr. Vol. IV, p. 1027, lines 14-16; Vol. V, p. 1365, lines 18-21). This evidence was presented by witnesses for the appellee and it was

certainly prejudicial error for the Court to refuse to permit the appellant to make reference to the burglary of his home.

Vol. VIII, p. 2002, lines 2-21. Again, the Court refused to permit appellant to refer to the burglary of his home which, as has been pointed out, had been commented on by appellee's witnesses.

Vol. VIII, p. 2014, lines 15-24

Vol. VIII, p. 2016, lines 16-25

Vol. VIII, p. 2017, lines 1-10

Vol. VIII, p. 2020, lines 15-18

Vol. VIII, p. 2021, lines 19-25

Vol. VIII, p. 2026, lines 16-17. This was the closing sentence of appellant's argument, his only opportunity to argue to the jury. The Court interrupted the closing sentence of his closing argument with no objection from either Mr. Maxwell or Mr. Babcock.

It is respectfully submitted that the foregoing references to the Reporter's Transcript of the Proceedings when viewed in the light of the decision in the *Ah Kee Eng,* supra, case establish that the appellant was denied an impartial trial by virtue of the prejudicial nature of the Trial Judge's treatment of the appellant as appellant's counsel.

Another basis which appellant urges as establishing that he was denied a fair and impartial trial is the closing argument of Mr. Babcock on the part of the appellee. This argument appears at Tr. Vol. VIII, p. 2026B, lines 24-25; p. 2027, lines 1-5. Mr. Babcock's argument was certainly intended to inflame the

jury against the appellant, particularly in view of the fact that the appellant had been repeatedly interrupted and admonished by the Trial Court throughout the scope of his argument.

Appellant respectfully submits that he was further denied his constitutional right to a fair and impartial trial by jury by virtue of the fact that the Court erred in giving the jury the additional instruction, which instruction was given by the Court after the jury had commenced its deliberations. In this regard, it is important to note that the jury retired for their deliberations at the hour of 4:42 o'clock p.m. on October 27, 1960. At 12:45 o'clock a.m. on the 28th day of October, 1960, Court was convened and the Court stated that it had received a message from the foreman requesting certain evidence (Tr. Vol. VIII, p. 2088). Following the request for this evidence, at 12:58 o'clock a.m., the Court received another message from the jury that they wished to adjourn for the evening and reconvene the following morning, and at 1:12 o'clock a.m. the jury was retired for the evening (Tr. Vol. VIII, p. 2094). At 10:00 o'clock a.m. on Friday, October 28, 1960, Court was reconvened with the jury present. The Court reviewed the various requests with the jury and stated in addition that

> "at this time the Court will give to the jury one additional instruction:" (Tr. Vol. VIII, p. 2102, lines 24-25)

and the following instruction was given:

> "Ladies and gentlemen of the jury, this is an important case. In all probability it cannot be tried better or more exhaustively than it has

been on either side. It is desirable that you agree upon a verdict. The Court does not want any juror to surrender his or her conscientious convictions. Each juror should perform his or her duty conscientiously and honestly according to the law and the evidence. Although the verdict to which a juror agrees, of course, must be his or her own verdict, the result of his or her own convictions and not a mere acquiescence in the conclusions of other jurors, yet in order to bring twelve minds to a unanimous result you must examine the question submitted to you with candor and with a proper regard and deference to the opinions of each other.

"You should consider that the case at some time must be decided and that you were selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to a jury more intelligent, more impartial or more competent to decide it, or that more or clearer evidence will be produced on one side or the other.

"In conferring together, you ought to pay proper respect to each other's opinions, with a disposition to be convinced by each other's arguments. On the one hand, if much the larger number of your panel are for conviction, a dissenting juror should consider whether a doubt in his or her own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself, who have heard the same evidence with the same attention, with an equal desire to arrive at the truth and under the sanctity of the same oath;

and, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and to distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their co-jurors.

"In so stating, the Court again emphasizes that no juror should surrender his or her conscientious convictions and a verdict arrived at and to which a juror agrees must be his or her own verdict, the result of his or her own convictions, and not a mere acquiescence in the conclusions of other jurors."

This instruction was erroneous in that it did not include any explanation of burden of proof on the part of appellee.

United States v. Allen, 186 F. 2d 439, 194 F. 2d 1.

In the *Allen* case, a similar instruction was given by the Court. However, the instruction in the *Allen* case contained this very important additional language which was not included in the instruction given by the Trial Court in the case at bar:

"In the present case the burden of proof—the burden is upon the Government to establish the guilt of the defendants beyond a reasonable doubt, and if you are left in doubt as to the guilt of the defendants, or any of them, such defendant or defendants is entitled to the benefit of that doubt and must be acquitted; . . ."

The Court's attention is respectfully directed to the case of *Billeci v. United States,* 87 App. D.C. 274, 184 F. 2d 394, 24 A.L.R. 2d 881 in connection with this instruction. In the *Billeci* case, the trial involving violation of a District of Columbia statute concerning lotteries lasted several days. The jury retired for deliberations at about noon on January 25; thereafter, at 5:18 p.m., the Court called the jury to the box and inquired as to their progress. At 9 o'clock p.m., the Court again called the jury to the box and inquired as to progress and at this point gave the jury the so-called Allen charge. Quoting from the decision of Circuit Judge Prettyman, commencing at page 890, 24 A.L.R. 2d, Headnote 8:

> "We return now to the first of the two instructions to which we have referred. This was given when the foreman advised the court that it was impossible for the jury to reach a verdict. The court said, in part:
>
> " 'Ladies and gentlemen of the jury, I am not convinced that it is impossible for you to reach a verdict. It may seem so, perhaps. But you must make additional endeavors. . . . If you believe from the testimony that the defendants have committed the crime of which they are charged, then you must find a verdict of guilty, irrespective of whether the witnesses appealed to you or not. On the other hand, if you do not believe that the defendants have committed the crime of which they are charged, then you must find a verdict of not guilty.
>
> " 'You must confine yourselves strictly to the question and ask yourself honestly, "Do I believe

> from the evidence I have heard at this trial that the defendants have committed this crime?" If you answer the question "Yes," you must find the defendants guilty. If your answer is "No," then you must find them not guilty. . . .' *That statement is not the law. The law is that if the jury believes beyond a reasonable doubt that the defendant has committed the alleged offense it should find a verdict of guilty, but if there be a reasonable doubt in the minds of the jurors they must acquit. The instruction given was error.*" (Emphasis supplied.)

Judge Prettyman then went on to make some very important observations concerning the rules governing a Federal Trial Judge. Quoting from the opinion of Judge Prettyman, commencing at page 893, 24 A.L.R. 2d, Headnote 14:

> "Since these cases must go back for new trial several features of the present record require us to state again the rule governing a federal trial judge in commenting upon evidence. It has been stated many times by many courts and many judges. This court stated it in Smith v. United States, again in Vinci v. United States, supra, and more recently in Sullivan v. United States.
>
> "A federal trial judge in a criminal case is not an inert figure. He is not a mere moderator. Besides his own exclusive functions of conducting the trial and declaring the applicable law, he may guide and assist the jury in its consideration of the evidence. The purpose of his comment is to aid, through his experience, the inexperienced laymen in the box in finding the truth in the confusing conflicts of contradictory evidence. In ex-

ceptional cases he may even express his opinion upon the evidence, or phases of it. But there is a constitutional line across which he cannot go. The accused has a right to a trial by the jury. That means that his guilt or innocence must be decided by twelve laymen and not by the one judge. A judge cannot impinge upon that right any more than he can destroy it. We cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether. It is for this reason that courts have held time and again that a trial judge cannot be argumentative in his comments; he cannot be an advocate; he cannot urge his own view of the guilt or innocence of the accused. Of course he may direct judgment of acquittal under proper circumstances.

"Moreover, other indestructible principles of our criminal law are pertinent to the comment of a judge upon the evidence. An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only one of them fixedly has a reasonable doubt, a verdict of guilty cannot be returned. These principles are not pious platitudes recited to placate the shades of venerated legal ancients. They are working rules of law binding upon the court. Startling though the concept is when fully appreciated, those rules mean that the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement.

"The public interest requires that persons who have committed crimes be convicted of them. But

the responsibility for producing the evidence which will persuade twelve jurors of guilt beyond a reasonable doubt is upon the prosecutor. It is a serious public responsibility, but it is upon the prosecutor and upon him alone. The judge has no part in that task. The prosecutor represents society in the prosecution. The attorney for the defense represents the accused. The judge is a disinterested and objective participant in the proceeding. 'Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge.'

"The difference between assisting the jury, which is a duty of a federal judge, and encroaching upon its responsibilities, which is forbidden, hase been developed at great length many times, as we have pointed out. When a federal judge comments upon evidence by expressing his opinion upon phases of it, he is treading close to the line which divides proper judicial action from the field which is exclusively the jury's. Therefore he must make it unequivocally clear to the jurors that conclusions upon such matters are theirs, not his, to make; and he must do so in such manner and at such time that the jury will not be left in doubt; references in some remote or obscure portion of a long charge will not suffice for the purpose.

"After a jury has returned a verdict of guilty the defendant is no longer the accused but is the convicted. It is at that point, and not until that point, that punishment becomes a function of the judge.

"It is a serious thing for an appellate court to reverse convictions in criminal cases. But the

> controlling importance is that the law be followed. The rules of law applicable to the function of the judge in a criminal trial by a jury are well settled. No matter what the impulse may be to transgress or evade them under provocative circumstances, they must be observed. This is basic, without exception, and compulsory.
>
> "The judgment of the District Court is reversed."

The language of Judge Prettyman in the *Billeci* case above quoted, when reviewed against the entire record of the trial in the case at bar, establishes that appellant should be granted a new trial in the interests of justice.

The Court's attention is again respectfully called to the case of *In Re United States,* supra, in which the United States Court of Appeals for the First Circuit through Mr. Justice Woodbury stated:

> "It may well be that solicitude for the essential rights of an accused requires the trial judge to cross-examine government witnesses when an accused with no capacity to protect his rights insists upon conducting his own defense or when an accused is represented by wholly inadequate counsel.
>
> . . .
>
> "We recognize that in the federal courts the trial judge is not relegated to the position of a mere moderator. He has the duty not only to make rulings of law but also to govern the trial to assure its proper conduct. Quercia v. United States, 1933, 289 U.S. 466, 469, 53 S. Ct. 698, 289 L. Ed. 1321. Moreover upon his shoulders

rests the duty to see that the trial is conducted with solicitude for the basic and essential rights of the accused. . . ."

The record in the case at bar when viewed in the light of the *United States v. Ah Kee Eng,* supra, *In Re United States,* supra, and the various other authorities cited by appellant in support of this proposition clearly establishes that appellant was denied a fair and impartial trial by virtue of the prejudicial nature of the Trial Judge's treatment of appellant in the presence of the jury throughout the trial.

IV

ATTORNEY FOR APPELLEE DURING HIS CLOSING ARGUMENT APPEALED TO THE PASSION AND PREJUDICE OF THE JURY CONCERNING IRRELEVANT MATTERS, THEREBY INTENDING TO INFLAME THE JURY AGAINST THE APPELLANT.

In his closing argument, the United States Attorney emphasized the attitude of the Trial Judge toward appellant in the eyes of the jury. The closing argument of the United States Attorney is as follows:

"May it please the Court, ladies and gentlemen of the jury:

"I want you to know that I will not give dignity to the remarks of Mr. Redfield by responding to them. I have some fifteen pages of notes taken during the course of those remarks. They will be discarded.

"Ladies and gentlemen, this is a nation of law, not of men. It would appear that this financial

> baron of Mount Rose is above the law. He has shown an arrogant contempt for my office, of this Court, of the United States and its many institutions. I am disgusted and indignant by his conduct here in court today, and for him I must apologize to the Court and to this jury.
>
> "You are called upon to render your verdict on the evidence and the testimony adduced at this trial, nothing else. I ask only one thing, that you do justice to this defendant, that you do justice to the United States." Tr. Vol. VIII, pp. 2026B-2027.

The second paragraph of the United States Attorney's closing argument develops the theme suggested by the Trial Judge against the appellant throughout the course of the trial. The United States Attorney depicts the appellant to the jury as a "financial baron of Mount Rose" above the law, insists to the jury that the appellant has shown an arrogant contempt for the office of the United States Attorney, an arrogant contempt of the Court, and an arrogant contempt of the United States and its institutions. The record certainly does not bear out the argument of the United States Attorney. The United States Attorney proceeded to inform the jury that he was disgusted and indignant by the conduct of the appellant in Court and took the liberty of apologizing to the Court and to the jury for the appellant. Such conduct on the part of the United States Attorney echoes the sentiments of the Trial Judge as expressed in the presence of the jury by the Trial Judge during the course of the trial, and the appellee's closing ar-

gument to the jury would certainly tend to prejudice the jury against the appellant and thereby deprive him of a fair and impartial trial.

In conclusion, the Court's attention is respectfully directed to the case of *Meeks v. United States,* C.A. 9 (1947), 163 F. 2d 598. In the *Meeks* case, the Circuit Court of Appeals for the Ninth Circuit said:

> "Indeed, in view of the fundamental character of these errors we may not affirm, even if we are 'without doubt' of appellant's guilt." (Page 602 in the opinion written by Judge Denman of the Circuit Court of Appeals for the Ninth Circuit. The language which is here emphasized by underscoring appears in italics.)

The Circuit Court in the *Meeks* case, cited *Bellenbach v. United States,* 326 U.S. 607, 66 S. Ct. 402, 90 L. Ed. 350. In the *Bellenbach* case, the Supreme Court of the United States, through Mr. Justice Frankfurter, stated:

> "From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." (Underscoring appears in italics.)

In view of the foregoing, it is respectfully submitted that the appellant did not receive that fair and impartial trial to which every accused is entitled under the Constitution and Laws of the United States of America. Therefore, the judgment of conviction in the Trial Court should be reversed and the case remanded for a new trial.

Dated, Reno, Nevada,
May 11, 1961.

Respectfully submitted,
GRUBIC, DRENDEL & BRADLEY,
By WILLIAM O. BRADLEY,
Attorneys for Appellant.